

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,

v.

MATTHEW R. DESCAMPS,
Defendant.

No. CR-05-104-FVS

ORDER DISMISSING MOTION
TO VACATE

THIS MATTER comes before the Court without oral argument based upon the "United States' Motion for Clarification and Extension of Time." The United States is represented by Stephanie Van Marter. The defendant is representing himself.

BACKGROUND

A jury found the defendant guilty of unlawfully possessing a firearm and/or ammunition. 18 U.S.C. § 922(g)(1). The Court found he fell within the scope of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1), and sentenced him to a term of 262 months imprisonment. He appealed the ACCA finding. While his appeal was pending, he filed two pro se motions seeking relief under 28 U.S.C. § 2255. The Court dismissed both motions without prejudice at the government's request because, "[e]xcept under most unusual circumstances, . . . no defendant in a federal criminal prosecution is

1 entitled to have a direct appeal and a § 2255 proceeding considered
2 simultaneously in an effort to overturn the conviction and sentence.”
3 *Jack v. United States*, 435 F.2d 317, 318 (9th Cir.1970), *cert. denied*,
4 402 U.S. 933, 91 S.Ct. 1530, 28 L.Ed.2d 867 (1971). On January 10,
5 2012, the Ninth Circuit affirmed this Court’s ACCA finding. The Clerk
6 of the Ninth Circuit issued the mandate on March 7th. On March 19th,
7 the defendant petitioned the Supreme Court for a writ certiorari. On
8 June 21st, he filed a document with the District Court Executive of
9 the Eastern District of Washington that this Court construed as a
10 request for relief under 28 U.S.C. § 2255. On June 25th, the Court
11 directed the United States to respond. On July 28th, the United
12 States filed a motion asking the Court to clarify its order of June
13 25th. As the United States observes, the Supreme Court has not acted
14 upon the defendant’s petition for a writ of certiorari. Thus, his
15 conviction has not become final. Given that circumstance, the United
16 States thinks a § 2255 motion is premature. The United States doesn’t
17 specifically move for dismissal of the pending § 2255 motion, but that
18 is the relief the United States seems to be seeking.
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20

21 **RULING**

22 Except in extraordinary situations, a federal prisoner may not
23 file § 2255 motion while his direct appeal is pending. *Jack*, 435 F.2d
24 at 318. To date, the Supreme Court has not acted upon the defendant’s
25 certiorari petition. Consequently, the United States is correct. The
26 judgment he is challenging is not final. His § 2255 motion is

1 premature and must be dismissed.¹

2 **IT IS HEREBY ORDERED:**

3 1. The United States' "Motion to Expedite" (**ECF No. 500**) is
4 granted.

5 2. The "United States' Motion for Clarification and Extension of
6 Time" (**ECF No. 499**) is granted in part. ECF No. 489 is dismissed
7 without prejudice.
8

9 **IT IS SO ORDERED.** The District Court Executive is hereby
10 directed to enter this order, furnish copies to the defendant and to
11 counsel for the United States, and close the case.

12 **DATED** this 1st day of August, 2012.

13 s/Fred Van Sickle
14 Fred Van Sickle
15 Senior United States District Judge
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21 ¹Given this ruling, the Court need not address the United
22 States' suggestion that the instant motion to vacate is a second
23 or successive motion for purposes of 28 U.S.C. § 2255(h). *Cf.*
24 *Stewart v. Martinez-Villareal*, 523 U.S. 637, 643, 118 S.Ct. 1618,
25 140 L.Ed.2d 849 (1998) (a habeas claim that is dismissed as
26 premature "should be treated in the same manner as the claim of a
petitioner who returns to a federal habeas court after exhausting
state remedies").